AFFIRMED; Opinion Filed June 19, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00508-CR

BRANDON DAVIS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-80734-2018

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Nowell

A jury convicted Brandon Davis of capital murder for robbing and killing Ahmed Omar. In three issues, appellant argues the trial court improperly refused a jury instruction on the lesser-included offense of murder, improperly admitted victim-impact testimony during the guilt/innocence phase of trial, and permitted improper prosecutorial comments during voir dire. We affirm the trial court's judgment.

FACTUAL BACKGROUND

Ahmed Omar owned and operated a convenience store, Sav-Mor, in southeast Dallas. When Omar and an employee closed the store at approximately 11:45 p.m. on February 13, 2018, Omar carried a briefcase containing cash and his gun to his car.

After midnight on February 14, 2018, Anwar Omar, Omar's son, was at home where he lived with his parents. He heard cars and then four gunshots in front of the house. After calling 9-1-1, Anwar and his sister went outside and saw their father in the front yard lying facedown. Omar's car was parked in the driveway. Although Omar's gun and briefcase had been taken, his laptop, cell phone, and wallet containing a large amount of money had not.

Omar died of multiple gunshot wounds. An autopsy showed Omar was shot four times: twice in the chest, once in the abdomen, and once in the shoulder. As to the shot on the right side of Omar's chest, the medical examiner testified: "There was a large amount of gunshot residue, soot, gun - - gunsmoke on the clothing and the skin, and there was also a muzzle imprint on the skin as well, despite having several layers of clothing on." The medical examiner determined the gun was pressed against Omar's clothing. The gun used to shoot Omar was not recovered.

Officer Jonathan Hay, a detective in the Plano Police Department's Crimes Against Persons Unit, identified appellant as a person of interest in Omar's death. Using cell phone data, police traced appellant's location on the night of Omar's

death; appellant traveled from the Sav-Mor to Omar's house in Plano and back to Dallas. Detective Aaron Benzick who obtained and mapped the cell phone data testified he had "zero doubt in my mind" that appellant traveled from the Sav-Mor in Dallas, to Omar's house, and back to Dallas.

On appellant's Facebook page, Hay saw a posting that was made at 2:50 a.m. on February 14: "Fucking up a bag for valentines."

After appellant was arrested, he agreed to talk to Hay; the jury saw a video of Hay interviewing appellant. Appellant told Hay that Omar carried a bag when he exited his car. Appellant grabbed Omar; "my intention was just to grab him and then him to be like 'here' [appellant makes a gesture of removing his wallet from his pocket] and then we take off running." Appellant believed Omar would either drop the bag or give it to appellant after appellant grabbed Omar. However, when Omar made a motion as though he was reaching for his gun, appellant became scared Omar would shoot him. Appellant explained he fired a shot toward Omar's ear, but did not believe the bullet hit Omar. Although appellant pushed Omar to the ground, grabbed the bag, and began to run away, Omar continued reaching for his gun. As appellant ran away, he turned back toward Omar and "I just kept shooting so I could get away." Appellant speculated the bag held $1,200-$1,300, and he took about $500. Appellant said he gave the bag to a "dope fiend" to dispose of.

During the interview, appellant stated: "I'm the one who shot the man. And I wasn't trying to. I was scared." Appellant told Hay several times he shot Omar, and asked how much prison time he would receive for capital murder.

A. Jury Charge

In his first issue, appellant argues the trial court improperly refused a jury instruction on the lesser-included offense of murder. We use a two-step analysis to determine whether a defendant is entitled to a lesser-included offense instruction. *Ritcherson v. State*, 568 S.W.3d 667, 670 (Tex. Crim. App. 2018). First, we determine whether the offense qualifies as a lesser-included offense under Texas Code of Criminal Procedure article 37.09. *See* TEX. CODE CRIM. PROC. art. 37.09; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). Appellant was convicted of capital murder pursuant to penal code section 19.03(a)(2), which states a person commits an offense if the person intentionally commits murder in the course of committing or attempting to commit robbery. *See* TEX. PENAL CODE § 19.03(a)(2). The Texas Court of Criminal Appeals has held that murder is a lesser-included offense of capital murder. *Smith v. State*, 297 S.W.3d 260, 275 (Tex. Crim. App. 2009) ("This Court has long held that murder is a lesser-included offense of capital murder."). We proceed to the second step of the analysis.

Second, we determine whether there was some evidence that would have permitted the jury to rationally find that, if the defendant was guilty, he was guilty only of the lesser offense. *Ritcherson*, 568 S.W.3d at 671. The second requirement

is met if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense. *Id.* The evidence raising the lesser offense must be affirmatively in the record; a defendant is not entitled to a lesser-included offense instruction based on the absence of evidence, and the evidence must be "directly germane to the lesser-included offense. *Id.*

We consider all the evidence admitted at trial, and if there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-charge instruction. *Id.* It does not matter whether the evidence is controverted or even credible. *Id.* We review the trial court's determination of the second step for an abuse of discretion. *Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004).

Appellant argues there is some evidence he abandoned the robbery because he was frightened when Omar attempted to retrieve his gun and, therefore, he could have been guilty only of murder. We disagree. The evidence does not show appellant abandoned the robbery. Rather, all evidence, including appellant's statements to Hay during the interview, shows appellant followed Omar from Sav-More to his home, grabbed Omar so he would either give appellant the briefcase or drop the briefcase, fled the scene with the briefcase containing Omar's money, and received approximately $500 from the cash in the briefcase. The evidence shows

appellant completed the robbery as intended, and no evidence shows he abandoned the robbery. "Given these facts, we conclude there is no evidence in the record from which a rational trier of fact could determine that appellant was guilty only of murder. The trial judge did not err in refusing the instruction." *Smith*, 297 S.W.3d at 275. We overrule appellant's first issue.

B. Victim-Impact Testimony

In his second issue, appellant asserts the trial court erred by allowing Anwar and Aida Omar, the decedent's children, to provide victim-impact testimony during the guilt/innocence phase of trial, which contributed to his conviction. The State asked Anwar: "Can you tell the jury what it has been like since your dad has gone?" The trial court overruled defense counsel's relevance objection, and Anwar answered:

> It has been tough. There is [sic] a lot of emotions in the house from my mom and my sisters. Me, as well. It is - - it is a little sense of uncertainty for the future with him not being there anymore. There is also quite a bit of pressure now on me, kind of, to be the man of the house, make sure everything goes good [sic] for the family. And as well, sleeping is hard now; and if I do sleep, it is not - - it is restless sleep. There is always a feeling of anxiety, depression.

The State solicited similar testimony from Aida, asking her: "what has life been like since your dad was killed?" The trial court again overruled defense counsel's relevance objection. Aida testified:

> It has been tough. Not a day goes by where we don't think about him. There has [sic] been times where we've - - our family has disagreed, and the only person we would know to help come to an agreement

> would be my father, and it is just hard not to have that person in our lives anymore.

For purposes of our analysis we will assume the trial court erred by overruling appellant's objections and permitting the complained-of testimony.[1]

Under rule 44.2(b), any error that does not affect a substantial right must be disregarded. TEX. R. APP. P. 44.2(b). A substantial right is affected when "the error has a substantial and injurious effect or influence in determining the jury's verdict." *Rich v. State*, 160 S.W.3d 575, 577 (Tex. Crim. App. 2005). Conversely, an error does not affect a substantial right if we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). When conducting a harm analysis, we consider the whole record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, the jury instructions, the State's theory and any defensive theories, closing arguments, voir dire, and whether the State emphasized the error. *See Rich*, 160 S.W.3d at 577-78.

The evidence against appellant was strong and the complained-of evidence was not likely to detract from the jury's consideration of the central issue before it—

[1] To the extent appellant complains about other testimony from Anwar or Aida, appellant did not lodge objections at trial. Therefore, we conclude these complaints, if any, have not been preserved for our review. *See* TEX. R. APP. P. 33.1.

whether appellant murdered Omar in the course of committing a robbery. Omar's children's responses to their father's death were not raised in voir dire or during opening statements. However, the State's closing argument discussed a father's importance to a family; the prosecutor stated: "And I cannot begin to imagine the loss that they feel as having lost that steady presence in their lives." Otherwise, Omar's role in his children's lives was not part of the State's and defense's presentations of their cases.

Considering the entire record, we conclude the trial court's errors in admitting the complained-of testimony from Omar's children did not have a "substantial and injurious effect or influence in determining the jury's verdict," and did not affect a substantial right. *See id.* We overrule appellant's second issue.

C. Voir Dire

In his third issue, appellant asserts the prosecutor made comments during voir dire that tainted the presumption of innocence and rendered the trial fundamentally unfair. The State responds appellant failed to preserve his complaint for review and, even if he had, the statements were not reversible error. During voir dire, the prosecutor told the venire:

> But what that means to you is that if you are on our jury and you find the Defendant guilty beyond a reasonable doubt, that means that he is going to be automatically sentenced to life in prison without the possibility of parole, okay?
>
> And I want to make sure that you really understand that and I am really conveying that in the best way I can. So we are not talking about

> just another person or some hypothetical person. We are talking about this person right here, Brandon Davis; and what that means is if you decide that he is guilty, based on the facts and evidence that are presented to you, at the end of the trial, you will not have a say in what punishment happens and that's - - normally you would. But in capital murder, it is automatic.
>
> So at the end of the trial, ***when you find him guilty***, he is going to walk through those doors, he is going to go to the Collin County Jail, where he is going to wait, and he is eventually going to be picked up by the Texas Department of Corrections, where he will be transferred to the penitentiary. And once he is at that state penitentiary, he is going to be assigned a cell; and he is going to spend the rest of his life in that cell, in prison.
>
> And that is a monumental task, right, to actually make that decision; and some people are going to be more comfortable with it than other people, so let me get your thoughts on that right now.
>
> . . . .
>
> So while the sentence is automatic, the Defendant does have several rights, okay? The first one - - and the judge touched on this - - is the presumption of innocence. ***As he sits here today right now, we have not proved anything to you. We haven't put on any evidence, we haven't put on any witnesses; and so you have nothing before you. So he is cloaked in the presumption of innocence as he sits here right now.***
>
> The indictment is not enough for you to think anything other or to lift that presumption of innocence, all right? Does that make sense to everybody?
>
> And he is afforded this right until we have proven our case to you. ***Once you go back there to deliberate, that's when that presumption of innocence is lifted*** and you can actually consider all of the facts and the evidence and find him guilty.

(emphasis added). Appellant did not object to the prosecutor's statements at trial.

"As a prerequisite to presenting a complaint for appellate review, the record must show" that "the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party

sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context[.]" *See* TEX. R. APP. P. 33.1(a)(1)(A). "[A]lmost all error—even constitutional error—may be forfeited if the appellant failed to object." *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008). "This rule applies to all but the most fundamental rights." *Henson v. State*, 407 S.W.3d 764, 767 (Tex. Crim. App. 2013).

As we have noted before, the Texas Court of Criminal Appeals has explained that rights not requiring an objection are a "narrow exception" to the general rule that error must be preserved. *See Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014); *Ward v. State*, No. 05-18-01498-CR, 2020 WL 2465327, at *8 (Tex. App.—Dallas May 13, 2020, no pet. h.) (mem. op., not designated for publication); *Williams v. State*, No. 05–18–00760–CR, 2019 WL 5119043, at *4 (Tex. App.—Dallas Oct. 7, 2019, pet. ref'd.) (mem. op., not designated for publication).

Appellant argues the prosecutor grossly misstated the law governing the presumption of innocence and, because the comments constitute fundamental error, he was not required to object. In support of his argument that the error is fundamental, appellant cites cases addressing comments made by the trial court during trial rather than the prosecutor. *See Jasper v. State*, 61 S.W.3d 413, 431 (Tex. Crim. App. 2001); *Blue v. State*, 41 S.W.3d 129, 132 (Tex. Crim. App. 2000). A criminal defendant has a due process right to procced before an impartial court. *See Brumit v. State*, 206 S.W. 3d 639, 645 (Tex. Crim. App. 2006) (Due process requires

a neutral and detached hearing officer). Appellant cites no cases, nor have we found any, holding that a prosecutor's statements about the presumption of innocence during voir dire can rise to the level of fundamental error. Rather, if the prosecutor in this case misstated the law during voir dire, then we view those statements to be akin to an improper jury argument, which is forfeited if it is not preserved with an objection. *See Hernandez v. State*, 538 S.W.3d 619, 622 (Tex. Crim. App. 2018) ("The right to a trial untainted by improper jury argument is forfeitable"). We conclude appellant has not demonstrated the prosecutor's statements constituted fundamental error and, accordingly, appellant forfeited appellate review of them by failing to timely object. We overrule appellant's third issue.

D. Conclusion

We affirm the trial court's judgment.

/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRANDON DAVIS, Appellant	On Appeal from the 296th Judicial District Court, Collin County, Texas
No. 05-19-00508-CR V.	Trial Court Cause No. 366-80734-2018.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Nowell. Justices Schenck and Molberg participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 19th day of June, 2020.